APR 2
MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1628

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, UNINCORPORATED LABOR ORGANIZATIONS,

Petitioners,

vs.

AMERICAN MAIZE-PRODUCTS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, UNINCORPORATED LABOR ORGANIZATIONS,

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AMERICAN MAIZE-PRODUCTS COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners Oil, Chemical and Atomic Workers International Union, AFL-CIO and Local 7-210, Oil, Chemical and Atomic Workers International Union, AFL-CIO, an international labor organization and its local affiliate, hereby respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 28, 1974 and thereby affirming the judgment entered by the United States District Court for the Northern District of Indiana, Hammond Division, on December 7, 1972.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not as yet reported. The docket number for the case is 73-1140.

JURISDICTION.

This Court's jurisdiction is invoked under Title 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. Whether under Section 301 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 156, 29 U. S. C. § 185, the issue of whether all the terms of a collective bargaining agreement between an employer and a labor organization had terminated was subject to arbitration under the provisions of that contract or whether the United States District Court and the United States Court of Appeals had authority to determine that issue and deny the labor organization's petition for arbitration.

2. Whether the United States Court of Appeals had the authority under the provisions of Section 301 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 156, 29 U. S. C. § 185, to interpret and apply the provisions of a collective bargaining agreement between an employer and a labor organization and thereby determine as a matter of law that said agreement had terminated and therefore the labor organization's request for arbitration was unenforceable.

STATUTORY PROVISION INVOLVED.

The statutory provision applicable to this case is set forth as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or

between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Section 301(a), Labor-Management Relations Act, 1947, 61 Stat. 156(a), 29 U. S. C. § 185(a).

STATEMENT OF CASE.

This suit was commenced by the Oil, Chemical and Atomic Workers International Union, AFL-CIO and Local 7-210, Oil, Chemical and Atomic Workers International Union, AFL-CIO, an international labor organization and its affiliate (hereinafter referred to collectively as the "Union").

The complaint sought enforcement of a demand for arbitration by the Union under the terms of a collective bargaining agreement between the Union and defendant American Maize-Products Company (hereinafter referred to as the "Employer"). The complaint to compel arbitration was filed in the United States District Court following the presentation by the Union to the Employer of a written grievance and the Employer's refusal upon the Union's request to submit the grievance to final and binding arbitration as required by the collective bargaining agreement. The sole basis of the Employer's refusal to submit to arbitration was its contention that the contract between the parties had terminated and alternatively, the grievance was without merit.

The Union's grievance, which formed the basis of its suit to compel arbitration, grew out of an admitted lockout by the Employer of members of the bargaining unit represented by the Union during the course of negotiations over new terms and conditions of the collective bargaining agreement between the parties. The Union and the Employer have had a long standing collective bargaining relationship. The Union alleged that pursuant to the established practice between the parties, the Union gave proper notice to the Employer of its desire to

negotiate modifications of the collective bargaining agreement. Negotiations were pursued between the parties following the Union's notice over a period of several months without any significant movement toward agreement. The Union alleged that its negotiators tendered to the Employer negotiators a 72 hour notice to call an economic strike, but conditioned the finality of such notice dependent upon whether or not proposals would be forthcoming from the Employer which could form the basis of agreement. Near the end of the 72 hour notice, the Union alleged the Employer for the first time during the protracted period of negotiations came forward with new proposals that could form the basis of agreement. Upon receipt of these proposals and under the auspices of the Federal Mediation and Conciliation Service, the Union negotiators withdrew their strike notice and directed members of the bargaining unit to continue in employment.

There was no dispute in the pleadings before the District Court that the Employer negotiators refused to accept the Union negotiators withdrawal of their strike notice and as members of the bargaining unit appeared at the plant gate at their normal working hours, they were refused entry by Employer armed security officers. It was and remained the Employer's position that the Union could not withdraw its strike notice and that in turn the Employer had the right to consider the Union on indefinite strike or in the alternative, that the Employer was not bound by the provisions of the contract prohibiting lockouts.

Following the forced work stoppage by the Employer, the Union alleged that members of the bargaining unit continued to offer to return to work. The Employer on the other hand continued to refuse entry to work by members of the bargaining unit. This situation persisted for many months while the Union alleged the Employer maintained operations of its facility by the hiring of persons not within the bargaining unit to perform bargaining unit work as defined by the collective bargaining agreement.

During the course of the proceedings in the District Court and the United States Court of Appeals, the Union contended that it had the right to arbitrate the following issues:

(1) Did the Employer have the right to lockout members of the bargaining unit and to continue the lockout in the face of the Union's repeated offer to return to work? Another way of phrasing that grievance, from the Employer's point of view, is whether the Employer had the right to commit the Union to its strike notice and to continue that commitment until the terms of the collective bargaining agreement were agreed upon. Subsidiary to this issue was the Union's contention that under the terms of the collective bargaining agreement, the strike notice was not irrevocable based upon the years of practice, conduct and expectations between the parties in many prior negotiations that did not culminate work stoppages.

(2) The issue of the Employer's contention that the contract between the parties terminated simultaneously with the end of the 72 hour period following the strike notice was subject to arbitration. That issue interrelates with that part of the Union's grievance contending that the Employer violated the collective bargaining agreement by hiring persons other than members of the bargaining unit to perform bargaining unit work while members of the bargaining unit continually offered to continue in employment. Subsidiary to these issues is the question of whether, if in fact the bargaining agreement between the Union and the Employer terminated, that automatically terminated the conditions of work between the Employer and its employees including the right to grieve and arbitrate.

The complaint was filed in the United States District Court while the work stoppage was still in progress and had been in existence for a period of time prior to the commencement of suit. The U. S. District Court granted summary judgment to the Employer based upon the Court's finding, as the court

interpreted the agreement, that whether or not the collective bargaining agreement terminated coexistent with the end of the 72 hour strike notice, the Employer was not bound by the lockout prohibitions of the contract. The United States District Court rendered its finding based upon the Court's interpretation of the collective bargaining agreement. The United States District Court did not consider any of the other elements inherent in the scope of the grievance as outlined above. The heart of the District Court's decision reads as follows:

> "The Union's second argument that their 60 day notice was a notice to amend only and therefore, under the provisions of Article XXIII, the Agreement remained in full force and effect past August 1, 1972 is in direct contravention to the position of the Company that the 60 day notice was a notice to terminate the Agreement and therefore the Agreement terminated by its terms on August 1, 1972. While this is an issue much disputed by the parties, the Court is of the opinion that, notwithstanding the characterization of the 60 days notice, in either event the no strike, no lockout provision of the Agreement (Article XXIII) terminated on August 1, 1972. Any dispute coming under this provision after it terminated would not be subject to the grievance and arbitration provisions, since it would not be a dispute under the terms of the Agreement still in full force and effect. Upon this conclusion the only further issue is whether the alleged lockout occurred prior to or after the termination of Article XXIII on August 1, 1972." (At p. 5 of District Court's Opinion and Memorandum.)

The Union appealed to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals neither accepted nor rejected the District Court's findings but rather rendered its own interpretation of the collective bargaining agreement in concluding that the entire scope of the Union's grievance was not arbitrable. The Court of Appeals concluded that although the Union's initial request for negotiations contained only a notice to modify the existing contract, language

the 72 hour notice bound the Union under the terms of the ntract, as interpreted by the Court of Appeals, to complete rmination of the agreement at the end of the 72 hours and at therefore any grievance relating to employer action fol-wing the 72 hours was not cognizable by an arbitrator. In is regard, the Court of Appeals concluded that:

> "We hold that the only reasonable construction which can be given to the May 22 letter is that it constituted a notice of termination. Hence under Article XXIII, the collective bargaining agreement terminated as of after midnight on August 1, 1972. ' . . . [A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960).
>
> . . . The grievance, whether based on the shutdown commencing after midnight on August 1 or on the temporary replacements in the unit thereafter, occurred after the termination of the agreement and was not arbitrable." (At pp. 5-6, emphasis supplied.)

HOW FEDERAL QUESTIONS WERE PRESENTED.

The complaint was filed pursuant to the provisions of Sec-on 301 of the Labor-Management Relations Act which con-erred jurisdiction upon the United States District Court for lleged breaches of a collective bargaining agreement, including he contractual provision requiring arbitration, without regard o the amount in controversy.

REASONS FOR GRANTING THE WRIT.

It would appear that the United States Court of Appeals ecognized that the United States District Court's decision to vithhold the Union's grievance from arbitration was not con-istent with the requirements of Section 301 of the Labor-

Management Relations Act as interpreted and applied by the Supreme Court of the United States in the "Steelworker Trilogy". *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). The Court of Appeals assumed that it avoided the requirement to submit issues of fact and contract interpretation to final and binding arbitration by holding that the subject collective bargaining agreement had terminated prior to the events which form the basis of the grievance. In so holding, the Court of Appeals held that as a matter of law it had the authority to render that threshold question of contract interpretation without a trial of the facts and although that particular question was circumvented by the District Court in its findings of fact and conclusions of law.

This case presents a very important question which should be determined by the Supreme Court. That question is whether it is fundamentally within the province of an arbitrator under the applicable provisions of a collective bargaining agreement to resolve a dispute whether under the terms of that agreement the contract and all of its provisions terminated. In this regard, an arbitrator would consider not only the provisions of the agreement, but if necessary, considerations of contract language ambiguity or estoppel, the past conduct and expectations of the parties in interpreting and applying the applicable provisions

The decision of the Court of Appeals for the Seventh Circuit, if not resolved will engender conflict between a body of arbitration decisions under collective bargaining agreement that the purview of Section 301 of the Labor-Management Relations Act and will create unnecessary conflict between employers and unions during the process of negotiations over new or modified terms of a collective bargaining agreement. As in the present instance, it is not unusual for such negotiations to extend beyond

the date set forth in a collective bargaining agreement for the termination or renewal of the terms of a current bargaining agreement.

It is important to note that the two Court of Appeals' decisions cited by the United States Court of Appeals for the Seventh Circuit in their subject opinion do not contain a complaint or petition to submit the labor dispute to arbitration. Neither *Baker* v. *Fleet Maintenance, Inc.*, 409 F. 2d 551 (C. A. 7, 1969) nor *Paterson Parchment Paper Co.* v. *International Brotherhood*, 191 F. 2d 252 (C. A. 3, 1951), *cert. denied*, 342 U. S. 933 (1952), was based upon a complaint or defense that the alleged contract violation should be submitted to arbitration under the terms of a collective bargaining agreement.

On the other hand, the Seventh Circuit's decision appears to be in conflict with the intent and direction of the decision of the Court of Appeals for the Fourth Circuit in *Winston-Salem Printing Pressmen and Assistants Union* v. *Piedmont Publishing Co.*, 393 F. 2d 221 (C. A. 4, 1968). In that decision the Court of Appeals for the Fourth Circuit held that the question of whether the provisions of a collective bargaining agreement requiring arbitration over unresolved terms of a new collective bargaining agreement survived the union's notice to terminate the contract was properly before an arbitrator under the provisions of that agreement. Consistent with the *Winston-Salem Printing Pressmen and Assistants Union* decision was the subsequent decision of the Court of Appeals in *H. K. Porter Co., Inc.* v. *Local 37, United Steelworkers of America*, 400 F. 2d 691 (C. A. 4, 1968).

The decision of the United States Court of Appeals in *Winston-Salem Printing Pressmen and Assistants Union* v. *Piedmont Publishing Co.*, is consistent with a substantial body of labor arbitration precedents that is in variance with the decision of the Seventh Circuit in the subject case to take upon itself the interpretation and application of the contract rather than deferring that central issue to arbitration. Illustrative of such

decisions are: *Station KARM and KARM FM* and *International Brotherhood of Electrical Workers*, 55 LA 752 (Arb. Thomas T. Roberts, 1970); *National Seating Co.* and *International Union of Electrical Workers*, 45 LA 476 (Arb. Ralph Hertz, 1968); *Aaxico Airlines, Inc.* and *Air Line Pilots Association*, 47 LA 289 (Arb. Harry H. Platt, 1966); *Peavey Co.* and *American Federation of Grain Millers*, 43 LA 539 (Arb. Duane L. Traynor, 1964); and *United Food Management Service Inc.* and *Luncheonette and Soda Fountain Workers*, 41 LA 76 (Arb. Alfred W. Blumrosen, 1963). Reference is also made to the decision of the California Supreme Court in *Broadway-Hale Stores* v. *Retail Clerks*, 55 Cal. 2d 754, 361 P. 2d 705 (Cal. S. Ct., 1961), affirming an arbitrator's decision that a collective bargaining agreement did not terminate by virtue of the Union's initial notice to alter or amend the collective bargaining agreement based in part upon the arbitrator's determination of the prior conduct of the parties.

CONCLUSION.

It is critical to the collective bargaining and arbitration process that a clarification be made by the Supreme Court whether the proper forum for the determination of whether a collective bargaining agreement terminates during the process of negotiation over the terms of a new or modified agreement, is in the courts or pursuant to arbitration. The United States Court of Appeals decision appears to carve out a significant exception to the deferral to arbitration consistently announced by the Supreme Court in *United Steelworkers of America* v. *American Manufacturing Co., supra; United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra; United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra* and *Drake Bakeries* v *Bakery Workers*, 370 U. S. 254 (1962). If the answer to that issue is in the affirmative then it is essential that the Supreme Court clarify whether a court, in determining whether a collec

tive bargaining agreement has terminated, can render that decision by its review of admittedly ambiguous contract language without the aid and the right of the parties to a full evidentiary hearing. We urge the Court to grant this petition.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1973 JANUARY SESSION, 1974

No. 73-1140

Oil, Chemical and Atomic Workers International Union, AFL-CIO, and Local 7-210, Oil Chemical and Atomic Workers International Union, AFL-CIO, unincorporated labor organizations,
Plaintiffs-Appellants,

vs.

American Maize Products Company,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 72 H 225

Judge.

Argued January 10, 1974 Decided January 28, 1974

Before SWYGERT, *Chief Judge*, KILEY, *Senior Circuit Judge*, and SPRECHER, *Circuit Judge*.

SPRECHER, *Circuit Judge*. The plaintiff-unions have appealed from the granting of defendant-employer's motion for summary judgment in an action which the unions brought under Section 301(a) of the Labor Management Relations Act, 29 U. S. C.

§ 185,[1] to compel the employer to arbitrate a grievance under the terms of a collective bargaining agreement.[2]

The collective bargaining agreement between the parties, effective August 1, 1970, set forth the terms and conditions of employment of 481 employees in the bargaining unit at the employer's Roby, Indiana, plant. The agreement provided a procedure for processing grievances (Article IX) and for submission to final and binding arbitration of all unsettled grievances (Article XII). Article XIII provided:

> "The Company agrees that during the term of this Agreement there shall be no lockouts.
>
> "The Union agrees that during the term of this Agreement there shall be no strikes, slowdowns, or work stoppages for any reason whatsoever."

Article XXIII provided:

> "This Agreement shall be effective upon the day of its execution and shall continue in effect, subject to the provisions of the Article on Contract Reopening, until August 1, 1972, and thereafter unless and until sixty (60) days' prior written notice is given by either party that it desires to amend or terminate this Agreement. Sixty (60) days prior to August 1, 1972, or any time thereafter by giving sixty (60) days' notice either party hereto may give notice as follows:
>
> "(a) To amend certain sections or articles of this Agreement, only, or
>
> (b) To terminate the entire Agreement.
>
> "In the event notice is given to amend only this Agreement, except Article XIII concerning strikes and lockouts, shall continue to be in full force and effect. In the event

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1. Section 301(a) provides in part that "Suits for violations of contracts between an employer and a labor organization . . . may be brought in any district court of the United States. . . ."

2. Section 301(a) confers power upon district courts to compel arbitration in accordance with the terms of a collective bargaining agreement. *Textile Workers of America* v. *Lincoln Mills*, 353 U. S. 448, 451 (1957).

no agreement can be reached on the Articles and Sections sought to be amended, the Union shall have the right to strike.

"In the event notice is given to terminate, the entire Agreement shall be void and of no effect as of the effective date of the notice . . . ."

On May 22, 1972, the local union gave the following 60-day notice:

"Pursuant to the provisions of the Labor Management Relations Act of 1947, you are hereby notified that we desire to modify the collective bargaining contract now in effect between your Company and this Union, in accordance with the provisions of the Agreement.

"We shall be glad to and now offer to meet and confer with you for the purpose of negotiating a new contract or modifications to the present Agreement."

Subsequent to the notice, the parties entered into contract negotiations. No agreement having been reached, the union on July 29, 1972, served a 72-hour notice of intent to strike after midnight on August 1, 1972.[3] Thereafter, some progress was made in the negotiations and the union hand delivered at 9:20 P. M. on July 31, 1972, a written withdrawal of the 72-hour notice to strike. At approximately 10:15 P. M., the employer advised the union that it could not unilaterally withdraw the 72-hour notice of strike and that the employer considered the union to be on strike as of 12:01 A. M. on August 1, 1972. On the night of July 31, 1972, when the employees came to work, some as early as 11:10 P. M., they found the gates of the plant closed and they were refused admittance to work.[4]

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3. Article XXIII of the collective bargaining agreement also provided: "Upon termination of the Working Agreement for any cause, or at any time, the Union shall have the right to strike under the terms of such Agreement. No strike shall be called unless the Company shall have first had at least seventy-two (72) hours written notice of the Union's intent to call a strike."

4. In view of our decision hereinafter, it is not necessary to decide whether the union had the right to unilaterally withdraw the 72-hour notice of strike or whether the shutdown of the plant was the result of a union strike or an employer lockout.

The union filed a grievance with the employer on August 8, 1972, stating that the employer had unlawfully locked out the employees in violation of the collective bargaining agreement. The employer refused to consider the grievance or to submit it to arbitration, whereupon, the unions' complaint was filed in the district court on August 31, 1972.

Both parties filed motions for summary judgment supported by affidavits, resulting in the district court's granting of the employer's motion and denying of the union's motion. The district court held that regardless of whether the local union's May 22, 1972 notice was considered a notice to amend or a notice to terminate under Article XXIII, the no-strike-or-lockout provision in Article XXIII would have terminated in accordance with Article XXIII and hence the shutdown of the plant resulted in a dispute under a terminated provision, which dispute the court held to be nonarbitrable.

The unions appealed and argued (1) that the district court lacked jurisdiction to determine whether the unions' grievance was arbitrable and (2) that the district court erred in concluding that the grievance was not arbitrable because "Article XIII [no strike or lockout provision] expired with the last shift on July 31, 1972." The essence of the unions' second argument was that even if lockouts were permissible under the contract upon a notice to amend (which the unions denied), the present dispute was arbitrable since the remainder of the contract continued in full force and effect and the grievance encompassed the right of the employer to hire temporary replacements during the lockout.[5]

In regard to the unions' first argument, it is well established that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into

5. *Compare Inland Trucking Co.* v. *N. L. R. B.*, 440 F. 2d 562 (7th Cir. 1971) *with Inter-Collegiate Press* v. *N. L. R. B.*, 486 F. 2d 837 (8th Cir. 1973).

by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962).

In regard to the unions' second argument, we agree with the district court's conclusion but for a different reason.

The local union's notice of its offer to meet with the employer "for the purpose of negotiating a new contract or modifications to the present Agreement" was a notice to terminate under Article XXIII inasmuch as a notice "to amend certain sections or articles . . . only" would have at the very least required a designation of the sections or articles desired to be amended. To speak of modifying or the modification of the present agreement without any specification of portions to be modified could only mean the modification of the entire agreement and hence the termination of that agreement and the substitution of a new agreement.

In *Baker* v. *Fleet Maintenance, Inc.*, 409 F. 2d 551 (7th Cir. 1969), the language of the union notice in a similar situation stated a desire to negotiate a "new contract . . . modifying the current contract. . . ." After finding that "the district court had a sufficient basis upon which to determine whether a collective bargaining agreement was in existence" at the time of the grievance, we held that "no reasonable construction can be given to these documents except that the parties intended . . . to give notice of the Union's desire to terminate the contract. . . ." 409 F. 2d at 554.

In *Paterson Parchment Paper Co.* v. *International Brotherhood*, 191 F. 2d 252 (3rd Cir. 1951), *cert. denied*, 342 U. S. 933 (1952), the court in a similar situation held that a notice that the union "desires a meeting with the Company for the purpose of discussing changes in the contract for the coming year" constituted a notice of termination of the contract.

Here the local union in its letter to the employer on July 31, 1972, stated that it "is herewith withdrawing the 72 hour notice *to terminate* the current contract. . . ." Inasmuch as the 72-hour notice to strike did not refer to termination, the July

31 letter, which withdrew, or at least purported to withdraw the 72-hour notice to strike, did not withdraw, nor purport to withdraw, the May 22 notice, which was obviously being characterized as a "termination" notice by the union itself.

We hold that the only reasonable construction which can be given to the May 22 letter is that it constituted a notice of termination. Hence under Article XXIII, the collective bargaining agreement terminated as of after midnight on August 1, 1972. ". . . [A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960).

We accept the district court's finding that the contract terminated with the last shift on July 31, 1972.[6] Therefore the fact that employees appeared at the plant as early as 11:10 P. M., on July 31, did not alter the fact that these employees were scheduled under the terms of the collective bargaining agreement to commence work after midnight on August 1, 1972, at which time the agreement had terminated. The grievance, whether based on the shutdown commencing after midnight on August 1 or on the temporary replacements in the unit thereafter, occured after the termination of the agreement and was not arbitrable.

The judgment order granting the employer's motion for summary judgment is affirmed.

AFFIRMED.

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6. The district court found: "The original provisions of the Agreement provided that first shifts would start at 12:00 midnight each day (Articles II and III). At oral argument the Union represented to the Court and it was not disputed by the Company that by agreement of the parties and pursuant to the terms of the Agreement, production employees' shifts were to commence at 11:30 p.m. The earliest that these employees could report to work for this shift was 11:10 p.m. All other employees retained the original shift time of 12:00 midnight.

"Based on this modification of the shift time, production employees began to report for work for the first shift of August 1, 1972 at 11:10 p.m. on July 31, 1972. At this time the plant gates were closed and these employees were refused entrance to the plant to work."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1626

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, UNINCORPORATED LABOR ORGANIZATIONS,

Petitioners,

v.

AMERICAN MAIZE-PRODUCTS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Miscellaneous.

Rules of the Supreme Court of the United States, Rule 21(1) 1,

Rules of the Supreme Court of the United States, Rule 23(1)(i) 1, 2,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1628

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, UNINCORPORATED LABOR ORGANIZATIONS,

Petitioners,

vs.

AMERICAN MAIZE-PRODUCTS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court was not reported. The opinion of the Court of Appeals for the Seventh Circuit is reported at 492 F. 2d 409.

JURISDICTION.

There are defects in the jurisdiction of this Court on the Petition for Certiorari because of the failure of petitioners to comply with the mandatory requirements of Rule 21(1) and Rule 23(1)(i) of this Court. Petitioners requested the Clerk

of the Court possessed of the record to certify the record to this Court but failed to furnish a copy of the request for certification and transmission of the record to the Respondent as required by Rule 21(1). Petitioners also failed to append a copy of the decision rendered by the United States District Court for the Northern District of Indiana, Hammond Division, in this case on December 7, 1972 as required by Rule 23(1)(i).

QUESTION PRESENTED.

The only issue which is presented to the Court on this Petition for Certiorari is as follows:

Is the Respondent, American Maize-Products Company, required to arbitrate a grievance which arose after the termination of the collective bargaining agreement between the parties?

STATUTE AND REGULATIONS INVOLVED.

The pertinent statute, being Section 301(a) of the Labor-Management Relations Act, is set forth in the Petition for Certiorari on pages 2 and 3.

In addition, Rule 21(1) of this Court, hereinbefore referred to, provides as follows:

> "1. A party intending to file a petition for certiorari may, prior to filing the case in this court or at any time thereafter prior to action by this court on the petition, request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this court, but the filing of the record in this court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the clerk of this court or any party to the case may request that additional parts of the record be certified and transmitted to this court. *A copy of all requests for certification and transmission shall be sent to all parties to the proceeding.*" (Our emphasis)

Rule 23(1)(i), hereinbefore referred to, provides as follows:

> "(i) There shall be appended to the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, *including all opinions of courts or administrative agencies in the case,* and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions and companion cases. The opinions shall include the caption showing the name of the court or agency issuing the same and the title and numbers of the case and the date of their entry. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented." (Our emphasis)

STATEMENT OF THE CASE.

This case originated through the filing by the Union (Petitioners herein) of a complaint in the United States District Court for the Northern District of Indiana to compel the Company (Respondent herein) to arbitrate a grievance. The written grievance of the Union is attached as Exhibit "B" to its complaint and it states "The Union's grievance is that the Company unlawfully locked out members of the bargaining unit * * *." The Company filed an answer to the complaint and subsequently filed a motion for summary judgment (supported by affidavit) on the ground that the grievance arose after the termination of the collective bargaining agreement between the parties. The Union also filed its motion for summary judgment supported by affidavit. After hearing oral argument on the respective motions for summary judgment, the District Court entered its order denying the motion of the Union for summary judgment and granting the motion of the Company for summary judgment on the ground that the collective bargaining agreement between the parties had terminated at the time the alleged grievance arose. Thereafter, the Union appealed to the Court of Appeals for the Seventh Circuit and the Court of Appeals affirmed the order of the District Court.

The Respondent in this case, American Maize-Products Company, is an employer in industry affecting commerce as defined in the Labor-Management Relations Act, and maintains and operates a manufacturing plant in Hammond, Indiana for the manufacture of products from corn. The Company employs approximately 482 hourly employees at this manufacturing plant, and these employees are represented by the plaintiff Union. (App. pp. 78 and 79)

On or about August 1, 1970, the Company and the Union entered into a collective bargaining agreement, a copy of which is attached to the complaint filed by the Union, made a part thereof, and marked Exhibit "A." (App. pp. 12 through 70) This collective bargaining agreement covers the wages, hours and working conditions of the hourly employees of the Company for a term from August 1, 1970 to August 1, 1972 and thereafter unless sixty days' notice is given by either party that it desires to amend or terminate the agreement. (App. p. 59)

By letter dated May 22, 1972 and a second letter dated June 22, 1972, the Union notified the Company that it desired to negotiate a new contract and negotiations on a new contract began in June of 1972. (App. pp. 79, 84 and 85)

The collective bargaining agreement in existence between the Union and the Company also provides that upon termination of the working agreement, the Union shall have the right to strike but only after giving the Company 72-hours' notice of the Union's intent to call a strike. The provision for the 72-hour notice of the intention of the Union to call a strike is for the purpose of affording the Company an opportunity for an orderly shutdown of the plant. (App. pp. 59 and 60)

Negotiations between the parties on a new collective bargaining agreement continued through the months of June and July, 1972, and on July 28, 1972, the Union served the Company with a notice that it intended to strike 72-hours from the effective date of the notice which meant that the Union would strike at 12:01 A.M. on August 1, 1972. (App. pp. 80 and 86)

After receiving this strike notice, the Company proceeded (at considerable expense) to shut down its plant in accordance with the notice and negotiations continued during the 72-hour period. On July 31, 1972 at 9:20 P.M. (less than three hours prior to the termination of the 72-hour period), the Union served the Company with a written document advising that the Union desired to withdraw the 72-hour notice to terminate the contract and extend the contract on a day-to-day basis with the right to re-serve the 72-hour strike notice. (App. pp. 80, 81 and 87)

At the time this attempt to withdraw the strike notice was made, the Company informed the Union that the shutdown of the plant had been completed in accordance with the 72-hour notice and that the strike was effective in accordance with the terms of the notice served by the Union, which notice had been acted upon by the Company to its detriment. (App. pp. 81 and 82)

In accordance with the terms of the 72-hour strike notice, the Company shut down its plant and did not schedule any unit employees to work on the shift beginning at 12:01 A.M. on August 1, 1972, and did not schedule any unit employees to work on any shift thereafter, and employees reporting to work between 11:00 P.M. and 12 Midnight on July 31, 1972, in order to work the shift beginning at 12:01 A.M. on August 1, 1972, were informed that they had not been scheduled because of the strike notice served by the Union. (App. p. 82)

Prior to the time that the Union served the strike notice on July 28th, the Union had not at any time suggested that the parties continue negotiations beyond the termination date of the collective bargaining agreement and continue the agreement on a day-to-day basis and had not requested any written extension of the collective bargaining agreement to permit further negotiations, despite the fact that the past practice of the parties had been to negotiate beyond the termination of the contract (prior to service of a strike notice) either under a day-to-day extension or with a definite extension of the contract. (App. p. 82)

ARGUMENT.

The general rules which establish the guidelines on the issue of the duty of an employer to arbitrate are set forth in the cases known as the Trilogy. In general, these cases hold that if there is a collective bargaining agreement and that agreement sets forth arbitration as a means of solving labor disputes, then there is a duty on the Company to arbitrate any grievance which it has agreed to arbitrate under the terms of the collective bargaining agreement. The cases also establish the rule that the question of arbitrability of any issue is a question for the courts and not the arbitrator. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

Since arbitration is a matter of contract and a company is only required to arbitrate what it has agreed to arbitrate under the terms of a collective bargaining agreement which is in force and effect at the time the issue sought to be arbitrated arises, it is clear that a company is not required to arbitrate a grievance which arises after the termination of the collective bargaining agreement in effect between the parties.

Since both the Company and the Union filed motions for summary judgment in this case and the Union also adopted the affidavit which the Company filed in support of its motion for summary judgment, it is clear that there is no dispute between the parties as to what the facts are which gave rise to the grievance which the Union is seeking to arbitrate. It is also clear that these facts lead inescapably to the conclusion that the collective bargaining agreement in effect between the parties had terminated at the time the grievance arose; and it is well settled that a Company is not required to arbitrate a grievance which arose after termination of the collective bargaining agreement.

Thus, in *Procter & Gamble Independent Union* v. *Procter & Gamble Manufacturing Co.*, 312 F. 2d 181 (2nd Cir. 1962) the Court held that an employer was not required to arbitrate a grievance which arose after the contract had been terminated under a notice by the Union and stated the rule in the following language: (p. 184)

> "We hold that the district court was correct in finding that the collective bargaining agreement which contained the applicable arbitration agreement expired by its own terms * * * It had, then, already expired before the occurrence of the activities out of which these grievances developed."

Also, in *Local Union No. 998, International Union United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO* v. *B. and T. Metals Co.*, 315 F. 2d 432 (6th Cir. 1963), the Court held that the Company was not required to arbitrate a lockout which had occurred after the collective bargaining agreement had expired by its terms. During the course of the opinion, the Court said: (p. 435)

> "If the agreement terminated according to its terms on May 3, and was not kept alive thereafter by reason of the negotiations between the parties, the no-lockout obligation on the part of the employer and its obligation to arbitrate the alleged grievance ceased to exist at the same time."

Another case which follows the universal rule that an employer cannot be required to arbitrate a grievance which arose after termination of the collective bargaining agreement is *International Brotherhood of Electrical Workers Local Union No. 1102, AFL-CIO* v. *Wadsworth Electric Manufacturing Co.*, 240 F. Supp. 292 (D. C. E. D. Ky. 1965) where the Court stated the rule very succinctly in the following language: (p. 293)

> "The first consideration in determining the issue presented in the case at bar is whether at the time of the claimed grievance there was a valid bargaining agreement in existence. The right to arbitrate the claimed grievance of Melton depends entirely upon a contract so providing."

The Union attempts to put the Company in a bad light in this case by stating on page 4 of its Petition for Certiorari that after withdrawal of the strike notice, the members of the bargaining unit were refused entry to the plant by "Employer armed security officers" and that after the work stoppage occurred, the Company maintained operations of its facility "by the hiring of persons not within the bargaining unit." Neither of these statements is true. The Company did not at any time have armed security guards at the plant, and the Company operated the plant later on during the work stoppage by the use of supervisors and not by hiring any persons outside the bargaining unit.

It is difficult to determine exactly what the Union's contention is in its Petition for Certiorari. However, it does appear that the Union is contending that the arbitrator and not the court should determine the arbitrability of the grievance.

Certainly, there is no principle more firmly established in the field of labor law than the one which states that the issue of arbitrability of a grievance is an issue which must be decided by the courts and not the arbitrator. This rule was established by this Court in the Trilogy cases (as hereinbefore pointed out) and also in the case of *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962) where the Court stated that "Whether or not the Company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."

On the basis of statements made on pages 10 and 11 of its Petition for Certiorari, it would also appear that the Union is contending that it was denied its right to a full evidentiary hearing in this case. Since the record in this case shows that both the Company and the Union filed motions for summary judgment in the District Court, this contention is totally inconsistent with the previous position of the Union in this case.

The Union states on page 9 of its Petition for Certiorari that it is important to note that the two decisions cited by the Court of Appeals in its opinion (*Baker* v. *Fleet Maintenance, Inc.*, 409

F. 2d 551 (7th Cir. 1969) and *Paterson Parchment Paper Co.* v. *International Brotherhood,* 191 F. 2d 252 (3rd Cir. 1951) cert. denied, 342 U. S. 933 (1952) did not contain a complaint to submit a labor dispute to arbitration. It is difficult for the Respondent to determine why that difference in those cases and the case at bar is significant because the two cases were cited by the Court of Appeals in support of the holding that the Union notice constituted a termination of the collective bargaining agreement.

Finally, the Union contends on page 9 of its Petition for Certiorari (in a desperate attempt to find some basis for the granting of its Petition) that the decision of the Court of Appeals in this case is in conflict with *Winston-Salem Printing Pressmen and Assistants Union* v. *Piedmont Publishing Co.,* 393 F. 2d 221 (4th Cir. 1968), and *H. K. Porter Co., Inc.* v. *Local 37, United Steelworkers of America,* 400 F. 2d 691 (4th Cir. 1968).

Even a cursory reading of the two cases cited by the Union establishes the fact that the decisions in those cases do not in any way conflict with the decision of the Court of Appeals in the case at bar. In the *Winston-Salem* case, the contract provided that the provisions of a new contract were matters subject to arbitration and the Court ordered arbitration because that was the agreement of the parties. In the *H. K. Porter Co.* case, it was undisputed that the grievance sought to be arbitrated arose during the term of the contract.

CONCLUSION.

In conclusion, Respondent submits that the Petition for Certiorari should be denied because: (1) there is no issue presented which is significant enough to justify the time of this Court in again reviewing legal principles already firmly established, (2) there is no reason for this Court to review a decision based upon its own peculiar facts, and (3) there is no conflict between the decision in this case and the decisions of this Court or the Courts of Appeal of any other circuits.

Respectfully submitted,

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